Administering Federal Laws and Regulations Relating to Native Americans

Practical Processes and Paradoxes

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For several decades, Indians and concerned non-Indians, including members of Congress, have recognized the need and have taken steps on many fronts to ensure communication with tribes during federal planning processes. For example, when federal actions may affect locations of religious or traditional cultural concern to Native American or Native Hawaiian groups, consultations are prescribed with tribes and / or traditional practitioners. Many avenues for communication have been opened or mandated through direct legislation, such as the American Indian Religious Freedom Act of 1978 and the Native American Graves Protection and Repatriation Act of 1990. In keeping with the intent of Congress, even more avenues of communication have been opened by federal agencies through revision, reinterpretation, or more rigorous application of existing regulations (e.g., 36 CFR 800), and agency guidelines such as National Register Bulletin 38. These and other changes are aimed at ensuring the opportunity for Native American concerns to be considered in the planning and completion of federal actions. At the same time, many states have instituted state laws that, at a minimum, protect Native American burials, and each may have one or more of its own consultation processes.

In regions of the country where federal and tribal lands are common and federally originated or permitted actions are frequent, the increased avenues of communication have virtually overwhelmed the infrastructure of many smaller tribes and have severely impacted workloads in even the largest tribal governments. Newly proposed amendments to the American Indian Religious Freedom Act seek to address this problem of workloads by extending review periods for tribes to 90 days. While such time extensions may provide near-term relief for workloads in some tribes, they treat only a symptom. Greater relief for all parties to consultations could be found through integration of consultation requirements.

The present process of tribal consultation is the result of accretion of steps prescribed by unrelated laws, regulations, and guidelines, most of which are designed to stand alone, so that if a particular criterion is met, a consultation is triggered. Frequently, however, some or all of the mandates come together creating a complex matrix of consultations to ensure that federal agencies and applicants for federal permits comply with each of the individual mandates. These mandates are not always compatible in timing, nor identical in topic or purpose. In addition to the process itself, which is complex, the volume of technical documentation that changes hands in the communications process can be immense.

In order to comply with responsibilities under laws, regulations, and guidelines, a federal agency may, for example, mail a 450-page archeological report to six different tribes and request a review and written, official tribal response within a set time frame. One week later, the same federal agency, for the same project, may mail a 275-page hydrology report to the same six tribes, requesting a different type of technical review and official comments, while in another few weeks, another archeological survey or testing report may be received and additional requests will be mailed. Very few tribes—and very few federal agencies—possess the infrastructure and resources to meet the demands of mandated consultations for very large federal undertakings, particularly if several are underway concurrently.

The nature of the parallel or randomly converging processes of tribal consultation and the extensive time frames of major federal undertakings combine to create numerous misunderstandings about what is taking place, even among experienced players. Large-scale federal undertakings requiring either an Environmental Assessment (EA) or full Environmental Impact Statement (EIS) generally have a two-year minimum planning period, but more often the planning, data gathering, writing, and decision-making take three to seven years. These long time frames frequently span the political terms of office of several successive tribal governments.

The earliest phases of such projects involve public scoping, and federal agencies today routinely involve tribes at this point. Unless the proposed undertaking makes intensive, continuing demands upon the time of all interested parties (which happens in some cases but not in others), a year or more may pass between the initial "scoping" contacts, in which the tribal governments are apprised of a proposed action, and successive phases that require consultations for various reasons. Meanwhile, in the time between each formal contact, tribal governments may change. The succeeding governments may know nothing of the project descriptions provided to their predecessors through face-to-face meetings and may not even be aware of voluminous documents on file within the tribal offices concerning the proposed project. This may result in complaints that the federal agency has failed to contact the tribe early enough in the planning process for an undertaking, when in fact, consultations may have been on-going for years, but with different tribal representatives. Ironically, the problem in some cases, therefore, is not that the federal process moves too fast with procedures such as 30-day response periods, but that the federal EIS process is too slow to mesh with political terms of office.

In order to understand the impact of mandated consultations between federal agencies and tribes upon the agencies, private proponents of federal actions (such as private industry and state and local governments), and

tribes, the individual mandates are summarized below. Points of convergence and divergence of the various laws, regulations, and guidelines are noted. As will be apparent, archeologists regularly play a role in tribal/agency consultations since several of the mandates for consultation have been added to new or existing processes that include archeology as a major component, such as compliance with Section 106 of the National Historic Preservation Act.

Act One: National Environmental Policy Act

Procedural Summary (Full-Scale EIS):

Agency Tribal Contact: May be EIS Coordinator, an agency field manager, cultural resource specialist, third-party EIS contractor, and/or representatives of an outside applicant.

Topic of Consultation: Broadest of all consultation channels; not limited specifically to Native American issues, all elements of an EIS are covered and are open to comment by tribes and the public.

Duration of Consultation Period: Minimum of two years, extreme of five, seven, or more years.

Method of Consultation: Public meetings, possible initiation of ethnographic and other channels of data gathering both for NEPA and in anticipation of subsequent legal requirements.

Volume of Documentation Generated (Review Workloads): Immense, if a tribe believes potential effects are significant enough to warrant full review of all background technical data collection and analyses. EIS technical reports typically fill several library shelves. Review requirements remain heavy even if a tribe chooses to focus only on a few topics, such as soils, hydrology, and cultural issues.

The formal planning process for large federal undertakings begins under the authority of the National Environmental Policy Act of 1969 (NEPA). NEPA requires the federal agency to consider whether a proposal to conduct some action on federal lands or with federal funds will have a significant effect upon the environment. The proposed action may originate within the agency, such as an erosion control project proposed to meet the agency's mission, or it may be received from outside the agency, from private industry, or state, local, or tribal governments. Certain proposals, such as large-scale power transmission lines, electric power plants, and coal mines, invariably are found to pose a significant threat to the environment and move directly to an EIS process. Lesser actions may be evaluated through Environmental Assessments (EAs), and certain specific actions of established minimal impact may be categorically excluded from full environmental assessment.

Among the first steps in initiating the EIS process are public "scoping" meetings, which are held to determine what issues are identified by the public as being significant given the specific proposed action. Public meetings are held following notice to the general public, while special interest groups, individuals, local governments, federal and state agencies, and Indian tribes are all routinely notified of meetings with direct invitations by mail. For federal EIS actions in New Mexico and other states with actively interested tribes, most agencies now coordinate special public meetings on tribal lands for the convenience of tribal members.

Three basic purposes should be served by NEPA "scoping" meetings: the agency (or the applicant for a federal permit under the direction of the agency) should provide the public with a reasonable understanding of what it proposes to do on federal lands or with federal monies. Next, the public is requested to identify the issues it believes are raised by the proposed action. Finally, alternative actions are defined; in practice this is frequently done by the agency or the outside applicant, but alternatives are open to modification and addition through discussions with the public.

NEPA scoping meetings occur at the beginning of the planning process for major federal actions and usually provide the first notification for tribes and the general public that an action is under consideration. When a tribe or any member of the public expresses interest in a proposed action a mailing list is established that is maintained and updated throughout the life of the EIS process—which can last from several to many years. For EIS projects of long duration, interested parties typically receive a newsletter updating progress. Interested parties or tribal entities may request to review all technical documents generated by the EIS data collection and analyses (within certain limits, such as the exclusion of archeological site locations to the general public), or only those related to selected topics of interest. Federal agencies conducting EIS processes are required at several junctures to seek and address public opinion on all issues related to the EIS (e.g., as draft documents are completed). This affords tribes and the public the opportunity to comment on at least several invited occasions over a period that may last three, five, or even seven or more years.

Almost immediately, as the NEPA process begins, consultations with tribes for other more specific purposes are triggered by the process itself and in anticipation of legal and regulatory processes that generally begin at later stages of a federal undertaking.

Act Two: National Historic Preservation Act

Procedural Summary:

Agency Tribal Contact: Generally an agency field manager or cultural resource specialist.

Topic of Consultation: Potential for adverse effect upon historic properties, including traditional cultural properties.

Method of Consultation: Correspondence, consultation meetings, field work, ethnographic studies

Duration of Consultation: For small projects managed under an Environmental Assessment, consultation may consist of a one time exchange of communications. Larger EIS projects may cover several months (excluding earlier NEPA consultations) to several years.

Volume of Documentation Generated (Review Workloads): Primary document is generally an archeological inventory report, which may range from a few pages for a very small proposed project, to a few hundred pages or several volumes for a large one.

It might come as a shock to some federal land managers who served their careers in the 1970s and '80s that the National Historic Preservation Act of 1966 (NHPA) is

*(**Carroll**—continued on page 18)*

(***Carroll***—*continued from page 17)*

probably now the best understood and most routinely implemented piece of legislation relating to cultural resources. The early years of its implementation were confused and contentious, and many issues were settled in the courts and through the federal appeals system.

Among other things, the law and its implementing regulation (36 CFR 800) established the Advisory Council On Historic Preservation (ACHP), the State Historic Preservation Officers (SHPOs), and the requirement for federal agencies to identify and evaluate historic properties and consider the effects of federal actions upon them. Although the law was enacted in 1966, the full effect of NHPA as originally drafted was not realized in many federal agencies for another decade, not until the Federal Land Policy and Management Act (FLPMA) of 1976 directed significant changes in philosophy and policy.

Recent amendments to NHPA (H.R. 429, October 30, 1992) provide major clarifications to long-standing questions, in some cases by codifying practices that had developed in many regions as measures for compliance with perceived intents of various portions of the original Act. Among these is the requirement to consult with tribes as well as local governments and the public in assessing adverse effects of federal undertakings upon historic properties. It is important to note that this portion of the NHPA amendments recognizing tribes as a "named public" for this specific purpose is similar to, but not the same as, the consultation required for NEPA, and it is decidedly different from guidance provided in National Register Bulletin 38, a set of guidelines and recommendations concerning consultations with traditional communities such as tribes. Bulletin 38 has been controversial and it is not universally accepted by all federal agencies. Finally, this consultation requirement is not the same in purpose or timing as other mandated consultations described below.

Virtually all federal undertakings requiring an EIS under NEPA also require a parallel process for compliance with Section 106 of NHPA. In practice, the identification process required for Section 106 compliance begins in order to fulfill analytical requirements of the EIS, but the undertaking-specific Section 106 process can be fully implemented only after a decision is issued on the EIS.

Act Three: The American Indian Religious Freedom Act

Procedural Summary:

Agency Tribal contact: Generally agency field manager or cultural resource specialist.

Topic of Consultation: Policies (or in practice, actions, see discussion) which could affect free practice of traditional religion.

Duration of Consultation: Can be a single exchange of communications for minor policies or small projects, or years of continuing discussion when incorporated into an EIS process.

Method of Consultation: Specific informational meetings with tribal officials and elders; can often include ethnographic studies, literature reviews, review of archeological survey data, and specific-purpose field inventories.

Volume of Documentation (Review Workloads): Review of project descriptions, archeological reports, and other documents commensurate with the project scope, up to major documentation described under NEPA.

The American Indian Religious Freedom Act (AIRFA) has fallen into disfavor with many Indians, who expected much more when it was signed into law in 1978. The Act was passed as a joint resolution of Congress primarily to assert that traditional religions should be considered equally with all other religions, and that federal agencies should not inadvertently infringe upon the freedom to practice traditional religions through such measures as seasonally closing national parks, or enforcement of certain controlled substance laws upon Indians. As originally passed, AIRFA was not intended by Congress to be regulatory and required only that federal agencies review existing policies to ensure noninfringement. Amendments to AIRFA sponsored in 1993 by Senator Inouye of Hawaii are designed to create a regulatory process under the Act.

Although AIRFA has been found through the courts not to possess the show-stopping power that some tribes had hoped, its passage in 1978 had a major impact upon the way that federal agencies do business, and vitalized the intensive communication matrix between agencies and tribes. Without specific direction from the law and in the absence of regulations many federal agencies and applicants for federal permits attempted to comply with the law's intent by means of ethnographic consultations with tribes and traditional leaders to identify impacts that had never been considered before. Although confusing at first, initial attempts at AIRFA compliance were an extremely positive step in reshaping relationships between federal agencies and tribes (for a bibliography of such transitional studies, see National Register Bulletin 38).

Act Four: Archeological Resources Protection Act

Procedural Summary:

Responsibility for Initiating Agency / Tribal Contact: Federal Land Manager, generally the field manager or cultural resource specialist.

Topic of Consultation: Effects of permitted archeological work upon archeological resources on public lands.

Duration of Consultation Period: May consist of single exchange of correspondence, or may be extremely detailed and carry over a period of one or more years.

Method of Consultation: Routinely handled through correspondence for small projects; large projects, with numerous or complex sites may involve face-to-face meetings, field site visits, detailed analysis and discussions of the analytical techniques proposed by the archeologists requesting a permit to conduct research or mitigation of effects through data recovery.

Volume of Documentation Generated (Review Workloads): Documents at a minimum consist of an archeological research design or treatment plan. Documents may be brief but are generally technical; large project or complex sites can generate treatment plans consisting of hundreds of pages, requiring extensive, detailed review. Very large projects with extensive

time frames may be subject to multiple mitigation phases conducted simultaneously or years apart by different archeological contractors.

The Archeological Resources Protection Act of 1979 effectively replaced the Antiquities Act of 1906 by establishing civil and criminal penalties for disturbance of certain resources on federal and Indian lands (the earlier Act having proved to be nearly unenforceable) and by restating a permitting procedure for professional excavation and removal of archeological resources. Unlike permits to conduct non-disturbing archeological inventories on federal lands, which are issued under FLPMA and can have a relatively wide geographic scope and wide time frames for conducting such work, ARPA permits for excavation and removal are site-specific. Every ARPA permit requires approval of a technical research design or treatment plan prepared by a qualified applicant. One of the steps in issuing such a permit (Sec.4.c. of the Act) is that, "If a permit issued under this section may result in harm to, or destruction of, any religious or cultural site, as determined by the federal land manager, before issuing such permit the federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance."

In the continuum of consultations within a large-scale EIS process, ARPA consultations would normally occur after those for NEPA, NHPA, and AIRFA, and sometimes NAGPRA, depending upon whether burials are anticipated given the nature of the resources involved. If burials are likely, NAGPRA consultations would be carried out early in the consultation process; conversely, in some regions of the United States, and under certain circumstances, burials might be unusual and consultations might parallel ARPA or even be omitted unless invoked under a discovery situation.

Act Five: Native American Graves Protection and Repatriation Act

Responsibility for Initiating Agency / Tribal Contact: Federal Land Manager, generally field manager or cultural resource specialist

Topic of Consultation: Disposition of human remains, associated funerary objects, and sacred objects (as defined under the Act)

Duration of Consultation: Uncertain, pending finalization of regulations, but a full range is likely under the regulations, which will probably provide the opportunity for agencies and tribes to enter into agreements to routinely handle certain common occurrences, while large or unusual projects may warrant special consultations over extended periods, for example, over the 30-year life of a mine.

Method of Consultation: If memoranda of agreement are permitted under the pending regulations, certain consultations under NAGPRA may involve single exchanges of communication (e.g., an agency notifies a tribe that it will or has reinterred remains in accordance with an existing agreement). Other forms of consultation may involve project-specific meetings or field visits.

Volume of Documentation: Archeological documentation of occurrence of human remains and other materials covered under the Act at a minimum. For large projects, concurrent review (with NHPA and ARPA reviews) of treatment plans, data recovery plans, etc., as they relate to human remains and other materials covered under the Act.

The Native American Graves Protection and Repatriation Act of 1990 deals with both the past and the future, concerning ownership of Native American human remains, associated funerary objects, sacred objects, and objects of cultural patrimony. Past collections of such materials are to be inventoried and the disposition of materials is to be determined under provisions of the Act. The Act further establishes procedures for federal agencies to follow when human remains are discovered in the future, or when they are intentionally excavated under permit. Unlike Section 106 of NHPA, the provisions of NAGPRA apply only to federal and Indian lands, and responsibility for compliance on federal lands lies with the land managing agency (as opposed to a permitting agency, which might assume "lead" in NEPA and NHPA actions). In some cases, however, in states such as New Mexico and Arizona with state laws that cover burials on state and private lands, NAGPRA agreements between federal agencies and tribes can be expanded to include uniform compliance on all lands by including the state regulatory agency in the development of memoranda of agreement.

Summary And Discussion

Five federal laws prompt consultations between federal agencies and Indian tribes:

The National Environmental Policy Act of 1969
The National Historic Preservation Act of 1966, including its 1992 Amendments and its interpretation in National Register Bulletin 38
The American Indian Religious Freedom Act of 1978
Archeological Resources Protection Act of 1979
Native American Graves Protection and Repatriation Act of 1990

Each law can stand alone and trigger consultations under certain circumstances and for different purposes, while in large projects all five may be invoked. When the latter occurs, the consultation and compliance process can become confusing for federal agencies and tribes alike.

The various laws and processes of compliance do not necessarily follow, one to the next, but sometimes run in parallel, or even with some contradiction of timing. For example, in the normal course of even a small project, it is not unusual for an archeological consulting firm to submit on behalf of their client (a company proposing an action on federal lands), an archeological survey report and treatment plan with an application for an ARPA permit to carry out mitigation of effects as proposed in the treatment plan. The federal agency then sends copies of these documents to tribes for review, asking for consultation under the following mandates:

- *under AIRFA,* concerning sites that may be of traditional religious concern that are not represented in the archeological record, if this issue had not been raised previously

*(**Carroll**—continued on page 20)*

(**Carroll**—*continued from page 19)*

- *under NHPA*, concerning identification of traditional cultural properties potentially eligible for the National Register of Historic Places
- *under ARPA*, concerning the likelihood that the proposed program of archeological mitigation might affect sites of religious importance
- *under NAGPRA*, if burials are anticipated and addressed in the treatment plan.

The above list comprises only a few of the consultation issues that might arise at a particular juncture of a project. When a proposed project is controversial, the five laws and their implementing regulations not only present a confusing array of consultations between federal agencies and tribes, they create a legal mine field of compliance.

It has been suggested that these processes, in particular the NEPA and Section 106 process, are compatible and not only can, but should be conducted simultaneously, with Section 106 process completed prior to the NEPA decision (King 1993). This would certainly be the preferred approach if cultural resources were the only issue, but in many cases it creates a paradox in NEPA's mandate to assess alternatives to a proposed action.

The NEPA/NHPA Problem

For all internal and external federal projects, it is useful to consider NEPA as the fundamental process and time-line that links the other processes. All federally approved, permitted, or authorized actions must consider likely environmental effects and must be addressed at a level of detail commensurate with the threat to the environment.

Certain actions are defined as "categorical exclusions," and each federal agency may have specific definitions of categorical exclusions that apply to its normal operations that pose minimal environmental threat, or that are required by other laws. These actions are documented at a level less than an EA, but (in most agencies) documentation still addresses, at a minimum, the issues of cultural resources and threatened and endangered species.

Small projects or proposed actions that do not meet the agency definitions of categorical exclusions are addressed through EAs, while large projects may warrant an extensive EA or full EIS.

It is important to note that other compliance processes relating to other laws are also set in motion by the NEPA time-line. When considering the multiple processes of cultural resource compliance, it is important to be aware of these other compliance requirements, each of which may be supported or opposed by its own special interest group.

Large projects require an almost continuous consultation process between agencies and tribes. The consultations are centered on the laws protecting various forms of cultural resources, but frequently shift in focus from secular, to religious, to traditional cultural, and back again many times over an extended time period that may span a decade or more. For large-scale EISs, initial contacts between the agencies and tribes frequently begin with the public scoping meetings described earlier. The outcome of these meetings—which is the identification of issues and alternatives to be addressed and carried through the EIS process—frequently is not a matter of science, but a matter of public perception.

Cultural resource issues will always be addressed insofar as required for compliance with the various laws and regulations, but if they are not identified by the public as "issues" they usually will not receive prominent billing in the EIS, as might issues such as jobs, air pollution, water pollution, or other items of high public interest. Tribes can and sometimes do identify cultural resource matters as potential issues through the scoping process, but the issues of top priority are frequently the same as those defined by non-Indian communities with cultural resource issues added.

The initial contacts between federal agencies and tribes for a specific project often occur months, and sometimes a year or more, before any form of active archeological or ethnographic data gathering might begin for compliance with the Section 106 or any of the concurrent compliance processes. These contacts are also frequently conducted by "third-party" EIS contractors, hired and paid by an applicant and theoretically directed by an agency. If the contacts are made by the agency itself, they are rarely carried out by the same personnel who will handle the majority of the detailed agency-tribal consultations later in the project.

While certain types of proposed actions can allow NEPA and Section 106 compliance to go forward in parallel to some extent, full Section 106 compliance frequently is not compatible with one intent of NEPA, which is to weigh all alternatives to a proposed action—including the "no-action" alternative.

The early and intermediate steps in the Section 106 process—archeological and ethnographic inventories, determinations of eligibility, and evaluations of effects posed by the proposed project—all now include consultations with Indian tribes. These pre-mitigation steps have become so expensive that their completion, in itself can present a strong argument by a company to their legislators that they have been led down a costly primrose path by an agency. This can bring extreme pressure to bear upon the agency to permit the action regardless of its EIS findings. Precisely the same set of conditions can be used by special interest groups opposed to the action to argue that the federal agency has prejudiced its decision by focusing on a preferred alternative while ignoring or only giving lip service to the rest.

During the EIS process, the federal agency must not prejudice its decision among the alternatives. No matter how likely one alternative may be, and no matter how unlikely the rest, if the federal agency initiates or approves initiation of a full-scale Section 106 process for one alternative prior to an EIS decision, it places itself in a highly vulnerable position, in appearance or in fact, of having approved an undertaking prior to completion of the assessment process.

This is a critical point that is likely to continue to frustrate attempts to streamline tribal consultations and related fieldwork efforts in the early NEPA/NHPA phases of many types of major projects. While from strictly a cultural resource point of view it would be ideal to have the Section 106 process completed before an EIS decision is

issued by the agency, it is neither economically realistic, nor technically compatible with NEPA. When NEPA became law in 1969, only three years after NHPA, this technical incompatibility was never envisioned, since at that time it was assumed that compliance would involve agency managers simply reviewing a list of properties already on the National Register; cultural resource compliance did not become a growth industry until FLPMA, 10 years later.

The paradox of the five consultation laws may be summed up in a statement that is a little tongue-in-cheek, but not much: agencies and tribes must consult—but not too much—until an unbiased decision has been reached under NEPA.

An emerging problem of the consultation laws is that although agencies and tribes have consulted regularly on large-scale or particular types of projects since AIRFA was passed in 1978, no projects or federally licensed, permitted, or approved undertakings are exempt from the requirements for consultation. This is a truism, but one that has been ignored until recently. Federal agencies conduct, permit, and approve vastly more projects than they have historically consulted upon.

Very recently, the Bureau of Land Management (BLM) Washington Office has added a line called: "Nat. Amer. Rel. Concerns" as a check box on an abbreviated EA form intended for very minor proposed projects, and has added the same topic as a critical element in the BLM manual for EAs in general. At the moment of this writing, virtually no one in the BLM perceives that this check box dictates consultation. In the absence of other provisions, however, BLM offices conducting federal business in areas of interest or concern to Indian tribes now need to consult on all proposed actions, not just large-scale proposals as they typically have in the past. Projects such as range fences, vegetative treatments, drinking tubs, issuances of minor rights-of-way, recreation permits—every action that the agency conducts or approves—is subject to consultation with the tribes.

Ironically, while some cultural resource advocates and probably some tribes might be aghast to learn that this hasn't been the case all along (AIRFA having been passed 15 years ago), the majority of BLM managers, specialists in other resources, and outside industries are going to be even more aghast when they find that every proposed project requiring an EA under NEPA will require individual consultation with all potentially interested tribes with a minimum 30-day response period, which will be extended to 90 days if the current draft amendments to AIRFA receive Congressional approval.

Programmatic Complexities

Over the past few years, agencies and tribes have turned to Programmatic Agreements (PAs) whenever the complexities of major projects have seemed overwhelming (there are other reasons for PAs, but this is one of the leading ones). These agreements are written under the authority of 36 CFR 800.13(b) to deal with Section 106 compliance, and have proven a workable vehicle for spelling out who does what and when, in order to meet the intentions of NHPA. Currently, even before final regulations for NAGPRA, some agencies are drafting project-specific NAGPRA Memoranda Of Agreement (MOAs) with tribes, and considering more generalized PAs to cover occurrences related to NAGPRA which may not be related to a particular large project.

It would be clearly beneficial to develop an agreement concerning consultations under AIRFA, but since AIRFA did not call for regulations, it is not clear what the authority for entering into such an agreement would be. If it can be legally drawn, such a PA could be patterned after portions of the Section 106 PAs in effect in many states between the ACHP, SHPOs, and agencies concerning levels of consultation and the classes of proposed actions subject to various forms of consultation.

Even the development of PAs to simplify matters is fraught with complications, however. One is that the different laws mandating consultations between tribes and agencies also empower different players. NAGPRA and AIRFA involve only Native Americans and the federal land managing agencies. NHPA includes the ACHP and SHPOs. It is problematic whether a unified PA could be devised to legally encompass all potential sources of consultations, and if it can, whether anyone would sign it given the divergent agendas surrounding these issues.

Unless and until congress passes "The Native American Consultation Unification Act of 19XX (or 20XX)," it is likely that even the simplification process will be unwieldy, since at least two separate agreements are likely to be required between each agency and tribe. One might combine AIRFA and NAGPRA consultations, with a second agreement for NHPA. Given its site-specific nature, ARPA will necessarily remain a source of case-by-case consultations. This may not seem particularly daunting, unless one realizes that some tribes may deal regularly or occasionally with a dozen offices of various federal agencies, and some agencies may conceivably need to consult with 50 or more Native American groups.

The best estimate right now is that many tribes and agencies are likely to find themselves requested to be signatories to dozens of such agreements—or to face the alternative of possibly thousands of individual consultations in the course of a year. Legislative relief in unifying tribal/agency consultations is highly unlikely, so it is up to the tribes and agencies to decide how they wish to communicate within the limited flexibility offered by the statutes.

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